Re Estate of Yong Wai Man, ex p Yong Khai Min

HIGH COURT (TAWAU) — ORIGINATING SUMMONS NO 6 OF 1988
IAN CHIN J
9 SEPTEMBER 1994

Succession *— Administration — Infant beneficiaries — Discretion of court to permit investment of property in unit trust fund — Whether guardian of infant beneficiaries a trustee — Guardianship of Infants Ordinance (Cap 54) (Sabah) s 15 — Trustee Act 1949 ss 5(3) & 59*

Trusts and Trustees *— Administration of estate — Investment — Duties of guardian of infant beneficiaries — Whether trustee — Whether guardian who is also trustee needs leave of court to invest estate money — Whether could invest in unit trust fund not approved by the Trustee Act 1949 — Guardianship of Infants Ordinance (Cap 54) (Sabah) s 15 — Trustee Act 1949 ss 4 & 5 — Federal Constitution arts 75, 162(1) & (6)*

Family Law *— Children — Guardianship — Rights of guardian over property — Right to invest — Whether placing money with a bank amounts to parting with possession of property of infants — Guardianship of Infants Ordinance (Cap 54) (Sabah) s 15(1)*

This was an application by the administrator of an estate ('the administrator') for the money of the said estate which had been held in trust for three minor beneficiaries to be reinvested. Counsel for the administrator proposed that a sum of RM200,000 be invested in MBF First Fund or such other unit trust fund as the administrator deemed fit with power to sell and reinvest from time to time and the balance to be put in a financial institution that offered the highest interest rate to earn deposits to meet the living and education expenses of the beneficiaries. In deciding the application, it was necessary for the court to determine what an administrator could do with the assets of an estate with infant beneficiaries.

Held, finding that the administrator could act in accordance with the provisions of the Trustee Act 1949 ('the Act'):

(1) Where the beneficiaries of an estate are minors, s 102 of the Probate and Administration Ordinance (Cap 109) (Sabah) ('the Ordinance') appears to defer the handing over of the residue of the estate to the beneficiaries. However, the Ordinance does not appear to have provisions governing the minor beneficiaries of an intestate.

(2) Section 15 of the Guardianship of Infants Ordinance (Cap 54) (Sabah) ('the Guardianship Ordinance') disallowed the sale, mortgage, exchange or parting with possession of the movable or immovable property of the infant without the leave of the court.

A By placing the money with a bank, the property in the money would pass to the bank and become a debt owing by the bank. Thus, the placing of money in a bank to earn interest amounted to a parting with possession of movable property which, unless permitted by the court, was prohibited by s 15.

B (3) A guardian holding the property of an infant was a trustee holding property under an implied trust for the infant. The Act applied to the implied trust which arose as soon as the guardian came into possession of the property of the infant.

(4) By virtue of art 75 read with art 162(1) and (6) of the Federal C Constitution, the Act, being a Federal law, prevailed over the Guardianship Ordinance. It followed that a guardian who was regarded as a trustee under the Act need not, notwithstanding s 5(1) of the Guardianship Ordinance, obtain leave of court before investing the money or property of the infant in any investment allowed by the Act.

D (5) The court, however, declined to exercise its discretion under s 59 of the Act to permit the administrator to invest in the MBf First Fund as it did not qualify as an approved investment under s 5(3) of the Act which required the company, inter alia, to have been paying dividends for the past five years.

E **Per curiam**:

Traditionally, the thinking of the court had been that the best and safest investment was to place the moneys of an estate with financial institutions to earn interest. However, as the financial system had F progressed so much that opportunities abound for money to be earned, including opportunities for investment, placing money in a bank may be unsuitable.

[Bahasa Malaysia summary

G Ini adalah satu permohonan oleh seorang pentadbir harta pusaka ('pentadbir itu') supaya wang harta pusaka itu yang telah dipegang atas amanah untuk tiga orang benefisiari budak dilabur semula. Peguambela pentadbir itu mencadangkan supaya jumlah sebanyak RM200,000 dilabur di dalam MBf First Fund atau skim amanah H saham lain yang sejenis seperti mana yang dianggap patut oleh pentadbir itu bersama kuasa untuk menjual dan melabur semula dari masa ke semasa. Bakinya pula disimpan di dalam institusi kewangan yang menawarkan kadar faedah yang tertinggi untuk memperolehi pendapatan bagi menampung perbelanjaan hidup dan pendidikan benefisiari-benefisiari itu. Dalam memutuskan permohonan itu, adalah I perlu untuk mahkamah membuat keputusan tentang apa yang boleh dibuat oleh seorang pentadbir dengan aset sesuatu harta pusaka yang mempunyai benefisiari-benefisiari budak.

Diputuskan, bahawa pentadbir itu boleh bertindak mengikut peruntukan Akta Pemegang Amanah 1949 ('Akta itu'): A

(1) Di mana benefisiari-benefisiari sesuatu harta pusaka adalah budak, s 102 Ordinan Probet dan Pentadbiran (Bab 109) (Sabah) ('Ordinan itu') nampaknya menangguhkan pemberian baki harta pusaka itu kepada benefisiari-benefisiari. Walau bagaimanapun, B Ordinan itu nampaknya tidak mempunyai peruntukan yang berkenaan dengan benefisiari-benefisiari budak seorang si mati tak berwasiat.

(2) Seksyen 15 Ordinan Penjagaan Budak (Bab 54) (Sabah) ('Ordinan Penjagaan') tidak membenarkan jualan, gadai-janji, penukaran C atau pelepasan pemilikan harta alih atau tak alih seseorang budak tanpa kebenaran mahkamah. Dengan menyimpan wang di dalam bank, harta di dalam wang itu akan berpindah kepada bank itu dan menjadi suatu hutang oleh bank itu. Oleh itu, penyimpanan wang di dalam bank untuk mendapat faedah adalah pelepasan D pemilikan harta alih yang, kecuali dibenarkan oleh mahkamah, dilarang oleh s 15.

(3) Penjaga yang memegang harta seseorang budak adalah seorang pemegang amanah di bawah suatu amanah tersirat untuk budak itu. Akta itu terpakai kepada sebuah amanah tersirat yang berbangkit sebaik sahaja seorang penjaga mendapat pemilikan E harta budak itu.

(4) Mengikut fasal 75 dibaca dengan fasal 162(1) dan (6) Perlembagaan Persekutuan, Akta itu, yang merupakan satu undang-undang Persekutuan, patut mengatasi Ordinan Penjagaan. Lantaran itu, seorang penjaga yang dianggap sebagai F seorang pemegang amanah di bawah Akta itu tidak perlu, meskipun terdapat s 5(1) Ordinan Penjagaan, memperolehi kebenaran mahkamah sebelum melabur wang atau harta budak itu di dalam pelaburan yang dibenarkan oleh Akta itu.

(5) Mahkamah, namun demikian, enggan menggunakan budi G bicaranya di bawah s 59 Akta itu untuk membenarkan pentadbir itu melabur di dalam MBf First Fund kerana ianya tidak layak sebagai suatu pelaburan yang diluluskan di bawah s 5(3) Akta itu yang memerlukan sesebuah syarikat itu, antara lainnya, supaya membayar dividen untuk lima tahun yang lalu. H

Per curiam:

Secara tradisi, pendapat mahkamah ialah bahawa pelaburan yang terbaik dan paling selamat adalah supaya meletakkan wang sesuatu harta pusaka dengan institusi kewangan untuk mendapatkan faedah. Namun demikian, memandangkan yang sistem kewangan telah maju I begitu banyak sehinggakan terdapat banyak peluang untuk

A memperolehi wang, termasuk peluang untuk melabur, mungkin tidak sesuai untuk menyimpan wang di dalam bank.]

Notes

For cases on trustees' duties of investment, see 12 *Mallal's Digest* (4th Ed) paras 930–932.

B For a case on the rights of guardians over property, see 7 *Mallal's Digest* (4th Ed) para 1500.

Cases referred to

C *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph* [1993] 2 MLJ 57 (folld)

Noel Kenneth Davidson v Firm Corp Sdn Bhd [1994] 2 MLJ 40 (folld)

PP v Tan Kah Pin (Tawau High Court Criminal Appeal No T(41) 14 of 1991, 8 September 1992) (unreported) (folld)

D **Legislation referred to**

Federal Constitution arts 75, 162(1), (6)

Guardianship of Infants Ordinance (Cap 54) (Sabah) ss 3, 4, 8, 14–19

Intestate Succession Ordinance (No 1 of 1960) (Sabah)

E Probate and Administration Ordinance (Cap 109) (Sabah) ss 3, 14, 94, 101–105, 123, 129

Trustee Act 1949 ss 2–6, 36, 59

Edwin Tsen (*Tan Pang Tsen & Co*) for the administrator.

F *Cur Adv Vult*

Ian Chin J: This is an application by Yong Khai Min, the administrator of the estate of Yong Wai Man, deceased ('the administrator') for the moneys of the said estate which had been held in trust for three minor G beneficiaries, namely, Yong Mui Poh, Yong Vun Bing and Yong Vun Sing ('the infants'), to be reinvested. The net asset of the estate consists of cash in the sum of RM375,435.87 as at 20 November 1986, the date of death. The court had on 15 June 1988 made the following order, viz:

(1) the applicant be excluded from becoming one of the beneficiaries H pursuant to s 61 of the Probate and Administration Ordinance (Cap 109) of the Laws of Sabah;

(2) the applicant may retain the sum of RM6,000 as out of pocket expenses from the estate;

(3) the balance thereof be deposited in the Hongkong & Shanghai Banking I Corp in the name of the applicant on trust for the beneficiaries with liberty to apply and withdraw to the extent of RM1,000 only per month commencing from June 1988 with liberty to reapply; and

(4) to distribute the remaining balance of the estate to the following beneficiaries upon them attaining the age of 18 in equal shares, namely:

(a) Yong Mui Poh — one-third (⅓) share

(b) Yong Vun Bing — one-third (⅓) share

(c) Yong Vun Sing — one-third (⅓) share

The administrator in his affidavit sworn on 2 February 1994 asserts that it is no longer possible to maintain the infants with the sum of RM1,000 per month, provided for in the order of the court, supra. He also asserts that he has not yet been disbursed the sum of RM6,000 which the court had ordered. The money of the estate remaining on 3 January 1994 is the sum of RM308,170.49 which is with the Hongkong & Shanghai Banking Corp (as it was then known), Tawau branch. The administrator is praying for an order:

(1) that a sum sufficient to disburse the administrator of the said RM6,000 and legal fees totalling RM4,538;

(2) that a sum equivalent to half of the balance of the money be placed in a fixed deposit on a 12 monthly basis with MBf Finance Bhd or any other financial institution; and

(3) that the remainder of the money be placed in a savings account with MBf Finance Bhd or any other financial institution but with 'no limit to be placed on the spending' for the benefit of the infants;

At the hearing on 11 April 1994, I proffered the off-the-cuff remark that the money of the estate had not grown since 1988 and that therefore, putting the money in a bank in the manner proposed may not be in the interests of the infants. I referred Mr Edwin Tsen, counsel for the administrator, to the Trustee Act 1949, and to the various unit trust funds that are available in the market and asked him to seek professional advice relating to the investment of the money of the estate. The matter was adjourned for Mr Edwin Tsen to put in a written submission which he did and made the following propositions:

(1) A sum of RM200,000 be invested in MBf First Fund or such other unit trusts as the administrator deems fit with power to sell and reinvest from time to time; and

(2) the remaining balance be put in a financial institution that offers the highest interest rate to earn deposits to meet the living and education expenses of the beneficiaries.

All this while, the thinking of the court had been that the best and the safest investment is to place the money with the financial institutions to earn interest. It may very well be true then but the financial system in the country had progressed so much in this decade that opportunities abound for money to be earned, including opportunities for investment. It is with this fact in mind that I had made the said off-the-cuff remark about the unsuitability of just putting the money in the bank. But there are limitations as to what an administrator can do with the assets of an estate. What then

A are the duties and powers of an administrator? It is to the relevant legislation that I will now turn to. In Sabah, the governing ordinance which came into force on 16 June 1947 is the Probate and Administration Ordinance (Cap 109) ('the Ordinance') where the duties and powers of an administrator are defined. As for an administrator, his rights relate back from the date of the grant of letters of administration to the date of death B of the deceased. This is what s 14 of the Ordinance says:

> Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administrator had been granted at the moment after his death.

C All properties of the deceased vest in the administrator (see s 3 of the Ordinance). As for powers, these are generally conferred by s 94 of the Ordinance which says:

> Chapter VIII
>
> (1) An executor or administrator has, subject to the provisions of this D section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 3.
>
> (2) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in E writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.
>
> (3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,
>
> (a) mortgage, charge, or transfer by sale, gift, exchange, or otherwise F any immovable property for the time being vested in him under section 3, or
>
> (b) lease any such property for a term exceeding five years.
>
> (4) A disposal of property by an executor or administrator in contravention of subsection (2) or subsection (3), as the case may be, is voidable at the instance of any other person interested in the property. G
>
> ...

Save for the restriction in s 94(3) of the Ordinance in relation to dealing with immovable property, an administrator appears to have unlimited powers in dealing with the properties of the estate of a deceased. However, H this seemingly wide power is circumscribed by the duties which the following sections of the Ordinance impose upon an administrator, viz:

> Chapter IX
>
> The Duties of an Executor or Administrator
>
> 101 (1) An executor or administrator shall —
>
> I (a) within six months from the grant of probate or letters of administration or within such further time as the Court which granted the probate or letters may from time to time appoint,

exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the creditors, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and

(b) in like manner within one year from the grant, or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, shewing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The Chief Justice may prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Penal Code.

102 The executor or administrator shall with all reasonable expedition and diligence collect the property of the deceased and the debts due to him and shall pay all debts due by the deceased's estate and the legacies under the will (if any), in accordance with the provisions hereinafter contained, and shall forthwith proceed, when there is no minority or other special reason to the contrary, to hand over the residue of the estate (if any), to the person or persons entitled thereto and to make his final report to the Court setting forth the manner in which he has discharged his duties.

103 Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all other debts.

104 Testamentary and administration expenses, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate are to be paid next after the funeral expenses and death-bed charges.

105 Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan, clerk or domestic servant are next to be paid, and then the other debts of the deceased according to their respective priorities (if any).

By the just quoted provisions, the administrator must, from the assets of the deceased, pay off his debts and in the priorities spelt out after which the administrator is to hand over the residue of the estate to the beneficiaries. The beneficiaries in the case of an intestate are those persons stipulated by the Intestate Succession Ordinance (No 1 of 1960) (Sabah), which need not detain our attention any further other than noting that the infants in this case are the beneficiaries under the said Intestate Succession Ordinance. Where the beneficiaries are minors, s 102 of the Ordinance, supra, appears to make an exception regarding the immediate handing over of the residue of the estate to the minor beneficiaries. What then should the administrator do with the cash in hand forming the whole of the residue estate, of which the minors are the beneficiaries? Section 102 of the Ordinance appears to

imply that they should not be handed over to the minor beneficiaries. There does not appear to be any provision in the Ordinance governing the minor beneficiary of an intestate though s 129 of the Ordinance makes provision for such minor beneficiary in the case of probate or an administration with the will annexed. Section 129 together with the attending sections of the Ordinance are reproduced here:

> Chapter XII
>
> Investment of Funds to Provide for Legacies
>
> 123 Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities, as the Chief Justice, may by notification in the Gazette prescribe, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.
>
> ...
>
> 129 (1) Where a legatee entitled by the terms of the bequest to the immediate payment or possession of the money or thing bequeathed is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court at the place where the probate was, or letters of administration with the will annexed were, granted to the account of the legatee and such payment into Court shall be a sufficient discharge of the money so paid.
>
> (2) Such money, when paid in, shall be invested in any of the securities prescribed under section 123, which securities, with the interest thereon, shall be transferred to the person entitled thereto, or otherwise applied for his benefit as the Court may direct.

Since the answer does not present itself in the Ordinance, I will now turn to the Guardianship of Infants Ordinance (Cap 54) (Sabah) ('the Guardianship Ordinance') which applies by virtue of the fact that the administrator in this case is, at least he claimed he is, also the guardian of the infants. The parents are under the law the lawful guardian but, under s 8 of the Guardianship Ordinance:

> If both parents of an infant have died without appointing a testamentary guardian, the Court or a Judge may appoint a guardian of the infant's person and property or either of them.

Various duties and limitations are also placed on the guardian appointed by the court and these are found in the following sections of the Guardianship Ordinance, viz:

> 3 The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.
>
> 4 The guardian of the property of an infant shall have the control and management of the infant's property, and shall deal therewith as carefully as a man of ordinary prudence would deal with his own property, and may, subject to this Ordinance, do all acts which are reasonable and proper for the realisation or protection of the infant's property.
>
> ...

14 (1) Where a person appointed by the Court is the guardian of an infant's property, he shall, unless the Judge otherwise orders, give security in such sum as may be appointed for the due performance of his duties as such guardian. A

(2) Such security shall be given in the manner prescribed for the time being in the case of receivers appointed by the Court, and the guardian so appointed shall pass his accounts at such periods as may be ordered, and shall pay into Court any balance certified to be due from him in the manner prescribed in the case of receivers. B

15 (1) A guardian of the property of an infant shall not, without the leave of the Court or a Judge —

(a) sell, mortgage, exchange or otherwise part with the possession of any of the movable or immovable property of the infant; or C

(b) lease any land belonging to the infant for a term exceeding one year.

(2) Any disposal of an infant's property in contravention of this section may be declared void, and on such declaration the Judge may make such order as appears requisite for restoring to the infant's estate the property so disposed of. D

(3) The Court or a Judge shall not make any order under sub-section (1) unless it is necessary or advisable in the interests of the infant.

16 A guardian of the property of an infant shall not, unless in any case the Court or Judge otherwise orders, be empowered to give a good discharge for any legacy or other capital monies payable or receivable by an infant. E

17 (1) A guardian of the property of an infant may make reasonable provision out of the income of such property for his maintenance and education, having regard to his station in life; but no sum exceeding one hundred dollars per month may be so applied without leave of the Court or a Judge. F

(2) Where the income of the infant's property in the hands of the guardian is insufficient for such purpose, or money is required for the infant's advancement, a Judge may order that provision for such purpose be made out of the capital of the infant's property, and for such purpose may authorise the sale, mortgage, transfer or charge of any part of the infant's property, and give such directions in regard thereto as may be necessary in the interests of the infant. G

18 (1) If it appears that, having regard to the station in life of an infant and to the value of his property and to all the circumstances of the case, it would be expedient that the capital property of the infant should be made available for his maintenance, education or advancement in such manner as to avoid the expense of applications to the Court, a Judge may instead of appointing a guardian of the property of the infant order that all the property of the infant of whatsoever description shall be placed in the hands of a person to be appointed by the Judge, with full power to deal with and apply the same for the purpose aforesaid in his sole and uncontrolled discretion; and in such case the receipt of such person so appointed shall be a good H I

A discharge to any person making any payment or transfer of any property to him on behalf of the infant.

(2) Any person so appointed may be ordered by the Court or Judge to render an account of his dealings with the infant's estate.

(3) The Court or a Judge may for any sufficient reason discharge any order or revoke any appointment, made under subsection (1), and
B may appoint another person with the same power or such greater or less power as may appear advisable, or may appoint a guardian of the infant's property.

19 Any guardian may apply to a Judge for his opinion, advice or direction on any question respecting the management or administration of the
C infant's property.

It is clear that because of the limit of 'one hundred dollars per month' set by s 17(1), the guardian has limited power to utilize the income even for the maintenance and education of the infant except with the permission of the court. But 'one hundred dollars per month' was a pretty large sum on
D 21 December 1946, the date of coming into force of the Guardianship Ordinance. Unfortunately, the law has not been amended to keep up with time. Apart from the limitation as to the disposal of the income in the said s 17(1), s 15 also disallows the sale, mortgage, exchange or parting with possession of the movable or immovable property of the infant without the
E leave of the court or judge. This brings me to the question of whether placing money in a bank to earn interest can be equated with parting with possession of the money which is prohibited by s 15. This in turn depends on what was the meaning of the words which the draftsman had used (as opposed to ascertaining what the draftsman meant to say). See *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph* [1993] 2 MLJ 57 at p 65.
F I would also like to add what was said in the unreported case of *PP v Tan Kah Pin* (Tawau High Court Criminal Appeal No T(41) 14 of 1991, 8 September 1992) viz:

> The function of the court is simply to ascertain the meaning of the Act as it stands. See the judgment of Lord Loreburn LC in *A-G & Board of*
G *Education v County Council of West Riding of Yorkshire, ex p Grenside* [1907] AC 29. If the words of statute are plain, you give effect to them (per Lord Coleridge CJ in *R v Mansel Jones* (1889) 23 QBD 29). I would also quote from the case of *Woodward v Watts* (1853) 2 E & B 452:
>
> > 'The golden rule in the construction of an Act of Parliament is to put
> H on the words of it their natural and grammatical construction although that may lead to some inconvenience, absurdity, or mischief; it being for the judges to construe Acts of Parliament, and not to legislate, and for the legislature to provide a remedy when one is wanted.'
>
> The court has no authority to limit a statute or put upon the words of a statute a limitation which is not according to the ordinary meaning of the
I words. See *Re Norman* (1886) 16 QBD 673. One final principle of law which is relevant is that as far as possible a statute should not be read to give it an effect such that it is a pointless piece of legislation. See *Smith Kline &*

French Laboratories Ltd v Salim (Malaysia) Sdn Bhd [1989] 2 MLJ 380 at p 382. A

To summarize, all that the court has to do is to consider what is the plain meaning of the words of the statute ...

I am of the view that placing the money in a bank to earn interest amounts to parting with possession of the movable property which, unless permitted by the court or judge, is prohibited by s 15. By placing the money with a bank, the property in the money passes to the bank with the result that the money becomes a debt owing by the bank to the depositor. See *Noel Kenneth Davidson v Firm Corp Sdn Bhd* [1994] 2 MLJ 40. If the property in the money passes, it surely amounts to a parting with possession of the movable property within the meaning of s 15. More so in the case of the money being invested in securities. It would be advisable for a guardian, as soon as he comes into possession of property belonging to the infant to seek the guidance of the court under s 19. There is also one other legislation which is relevant and that is the Trustee Act 1949 ('the Act') which applies throughout the nation from 30 June 1965. The Act applies to trusts including executorships and administratorships (see s 2) and it contains extensive provisions regarding the powers of a trustee. Can a guardian appointed under the Guardianship Ordinance be regarded as a trustee within the meaning of, and thus exercise the powers given by, the Act? The Act has been expressed (see s 2(1)) to apply to 'trusts' and 'trust' has been defined (see s 3) to include implied and constructive trusts. A guardian holding the property of the infant is surely a trustee holding the property under an implied trust for the infant. I am of the view that the Act applies to an implied trust which arises as soon as the guardian comes into possession of property belonging to an infant; thus, the guardian of the property of an infant can be regarded as a trustee within the meaning of the Act and attracts the application of the Act. The Act confers upon a trustee the following powers, viz:

B C D E F

Part II

Investment

4 Authorized investments G

(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following —

(a) in any of the securities of the Federal Government or the Government of the State of Sabah or the State of Sarawak or of the Republic of Singapore; H

(b) in any securities the interest on which is or shall be guaranteed by Parliament or by the Federal Government;

(c) in or upon titles to immovable property in Malaysia, such titles being freehold titles or grants in perpetuity or leases (other than mining leases) for a term whereof sixty years at least is unexpired at the time of such investment: I

A Provided that —

(i) the land to which any such title relates shall be situate within the limits of any City, Municipality, Town Council or Town Board area; and

(ii) there be erected on the land to which such title relates
B houses or other buildings the gross rental whereof, together with the land appurtenant thereto, is at the time of such investment not less than seven per centum of the purchase price of the land, in the case of a purchase price, or of the value of such land, as ascertained under section 12(1)(a) in the case of a charge.

C (d) in fixed interest securities issued in Malaysia with the approval of the Treasury by any public authority established under federal or State law;

(e) in loans to an approved company;

(f) in loans the principal and interest on which is or shall be
D guaranteed by the Federal Government,

and may also from time to time vary such investment as aforesaid.

(2) No trust funds shall be invested under subsection (1)(e) unless —

(a) the paid up ordinary share capital of the approved company is not less than five million ringgit; and
E

(b) the approved company has paid a dividend at the rate of not less than five per centum upon such ordinary share capital during each of the last three years prior to the time of investment, and where the approved company is a company which has acquired the assets and liabilities of another approved company, payment of a dividend by that other company during
F each of the last three years prior to the time of such acquisition shall be treated as payment by the approved company; and

(c) the total amount of the borrowings of the approved company from all sources, whether trustee or not, accepted by the approved company on loan and deposit, and including interest due thereon and not repaid by the approved company, does
G not at any time exceed two-thirds of the amount, excluding prospective interest, for the time being secured to the approved company from its borrowers.

...

5 Further powers of investment of trustees

H (1) The investments specified in section 4 shall include any security to which this section applies and any units, or any shares of the investments subject to the trust, of a unit trust scheme approved by the Yang di-Pertuan Agong by notification published in the *Gazette.*

(2) Subject to this section, this section applies to any securities issued by a company (whether incorporated in Malaysia or elsewhere)
I prices for which are quoted on the Stock Exchange of Malaysia.

(3) This section does not apply to securities of any company unless — A

(a) the total issued and paid-up share capital of the company is, or if converted into ringgit from a currency other than ringgit is, five million ringgit or more; and

(b) the company has in each of the five years immediately preceding the calendar year in which the investment is made paid a B dividend on all the shares issued by the company, excluding any shares issued after the dividend was declared and any shares which by their terms of issue did not rank for the dividend for that year,

and the rate exchange in relation to the conversion of issued and paid-up share capital shall be that certified by a bank manager, as defined in C section 6(3)(b), to be appropriate on the day a trustee exercises his power to invest in such securities.

There are also provisions in the Act for the trustee to seek proper advice with regards to the investment (see s 6). This brings me to the next question of whether a guardian who is regarded as a trustee under the Act D needs permission of the court or judge under s 15(1) of the Guardianship Ordinance to make investments authorized by the Act. There seems to be a conflict in this regard between the Guardianship Ordinance and the Act. The conflict also extends to the powers to apply the income for the maintenance and education of an infant under the Act which I will advert to later. I am of the view the Act prevails by virtue of art 75 read with E art 162(1) and (6) of the Federal Constitution, viz:

75 Inconsistencies between federal and State laws

If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be F void.

162 Existing laws

(1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made G therein under this Article and subject to any amendments made by federal or State law.

(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this H Constitution.

It is within the competency of Parliament to pass and extend the Act to Sabah since the subject matter of the Act falls within the Federal List of the Constitution. It follows that a guardian who is to be regarded as a trustee under the Act need not, notwithstanding s 15(1) of the Guardianship I Ordinance, obtain the leave of the court or judge before investing the money or property of the infant in any of the investments the Act allows.

What then of the 'one hundred dollars per month' limit set by s 17(1) of the Guardianship Ordinance, supra? Again, I am of the view, for the reasons I have already set out, the Act prevails. The Act gives very wide powers to a trustee to apply the income towards the maintenance of an infant. One of such provisions is s 36 of the Act which says:

> Power to apply income for maintenance and to accumulate surplus income during a minority
>
> (1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property —
>
> (a) during the minority of any such person, if his interests so long continues, the trustees may, at their sole discretion, pay to his parents or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit, the whole of such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is —
>
> (i) any other fund applicable to the same purpose; or
>
> (ii) any person bound by law to provide for his maintenance or education; and
>
> (b) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) to him, until he either attains a vested interest therein or dies, or until failure of his interest;
>
> Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the minor and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the Court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.
>
> (2) During the minority of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorized investments, and shall hold those accumulations as follows:
>
> (a) if any such person —
>
> (i) attains the age of twenty-one years, or marries under that age, and his interest in such income during his minority or until his marriage is vested interest; or
>
> (ii) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which the income arose the trustees shall hold the accumulations in trust for the person absolutely, and so that the receipt of such

person after marriage, and though still a minor, shall be a good discharge; and

(b) in any other case the trustees shall, notwithstanding that the person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes,

but the trustees may, at any time during the minority of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five ringgit per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the minority of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

The administrator in this case is also a guardian as well as a trustee. Since he is a trustee he should be guided by the Act subject to whatever terms the court or judge may have imposed. I must point out here that I have not set out all the relevant provisions of the Act and a trustee is well advised to go through the Act thoroughly. As for the question of guardianship, there is no record to say that the administrator had been appointed a guardian but since he has acted as one for so many years now, I, by virtue of the powers conferred on me by s 8 of the Guardianship Ordinance, hereby appoint the administrator, Yong Khai Min, the guardian of the infants' persons and properties. The time will come when the infants will need travel documents which the administrator can only apply for if he is legally constituted the guardian which I have just done. For the avoidance of doubt, the administrator is now to regard himself as guardian of the infants' persons and properties as well as being a trustee of the infants' properties and he is to comply with the provisions of the Act as regards the investment of the properties of the infants and the application of the moneys for the benefit of the infants. The administrator, Yong Khai Min, shall in every 12 months cause to be prepared a statement of account relating to the properties of the infants and lodge the same with the High Court at Tawau together with all supporting receipts, invoices and other relevant documents. As for moneys of the infants now with the Hongkong & Shanghai Banking Corp (as it was then known), Tawau branch, the administrator, Yong Khai Min, shall be allowed to take the moneys out for the purpose of dealing with the same in accordance with the provisions of the Act. I

finally order that the administrator be paid out of the moneys the various sums which I have referred to at the outset and claimed by the administrator.

I have not acceded to the application that I exercise my discretion under s 59 of the Act to permit the administrator to invest in the MBf First Fund, a unit trust fund, which only operated from 2 May 1991 and therefore does not qualify as an approved investment under s 5(3) of the Act which requires the company, inter alia, to have been paying dividends for the past five years. The proposed investment does not appear to have the support of any advice of a stockbroker obtained through the trustee's bank manager nor the advice of an authorized accountant as required by s 6 of the Act since no such advice had been adverted to or their opinion exhibited. There are, to my knowledge, other units trust funds which qualify. I would impress upon the administrator that he should obtain proper advice as required by the Act before the investments can be safely made and be always guided by the provisions of the Act.

Order accordingly.

Reported by Kevin Ooi